

Pogacnik v A.O. Smith Water Prods. Co.
2018 NY Slip Op 31160(U)
April 23, 2018
Supreme Court, New York County
Docket Number: 190340/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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TATJANA POGACNIK, as Executrix of the
Estate of LEON B. POGACNIK, and
TATJANA POGACNIK, Individually,

Index No. 190340/2015

Plaintiff

- against -

DECISION AND ORDER

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants
-----X

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff seeks damages for the deceased Leon Pogacnik's injuries and death from exposure to materials and equipment containing asbestos during his employment as an architect from 1969 to 1983. Plaintiff filed a timely notice of claim with defendant Port Authority of New York & New Jersey October 27, 2015, claiming that Pogacnik developed mesothelioma due to his exposure to asbestos while working at John. F. Kennedy (JFK) Airport as an architect from "approximately 1972-1973." Aff. of Marshall S. Turner Ex. A, at 1. Plaintiff's chart of Pogacnik's history of employers and jobsites, an exhibit to the complaint, lists work on two JFK Airport projects and three other projects while employed by Eliot Noyes Associates from 1973 through 1982, but not in 1972. Pogacnik later testified at his deposition, in which the Port Authority participated, that he worked at JFK Airport on two projects: a Northwest Airlines administration

building during the late 1970s for six to nine months, and the Pan American Airways terminal during the late 1970s for five to seven months. Defendant Port Authority now moves to dismiss plaintiff's claims against it, maintaining that the court lacks subject matter jurisdiction over the action against the Port Authority because plaintiff's notice of claim failed to allege that Pogacnik was exposed to asbestos at JFK Airport during the late 1970s as plaintiff now claims in this action. C.P.L.R. § 3211(a)(2).

II. THE PORT AUTHORITY'S MOTION

Plaintiff was required to serve the Port Authority with a notice of claim setting forth "the time when, the place where and the manner in which the claim arose." N.Y. McKinney's Unconsol. Laws § 7108. The requirement for a notice of claim is jurisdictional, Belpasso v. Port Auth. of N.Y. & N.J., 103 A.D.3d 562, 562 (1st Dep't 2013); City of New York v. Port Auth. of N.Y. & N.J., 284 A.D.2d 195, 195 (1st Dep't 2001); Lyons v. Port Auth. of N.Y. & N.J., 228 A.D.2d 250, 251 (1st Dep't 1996); Luciano v. Fanberg Realty Co., 102 A.D.2d 94, 98 (1st Dep't 1984), and must be strictly construed. Lyons v. Port Auth. of N.Y. & N.J., 228 A.D.2d at 251; Luciano v. Fanberg Realty Co., 102 A.D.2d at 98. The specificity required in a notice of claim is to allow the Port Authority the opportunity to investigate and ascertain the scope of the potential claim. In re New York City Asbestos Litig., 24 N.Y.3d 275, 282 (2014). See Brown v. City of New York, 95 N.Y.2d 389, 392 (2000); Ayers v. Mohan, 145 A.D.3d

553, 555 (1st Dep't 2016); Person v. New York City Hous. Auth., 129 A.D.3d 595, 596 (1st Dep't 2015).

Plaintiff's notice of claim satisfied the statutory requirements as it specified that Pogacnik developed mesothelioma as a result of his exposure to asbestos while working at JFK Airport from approximately 1972 to 1973. N.Y. McKinney's Unconsol. Laws §§ 7101, 7108. Plaintiff's notice of claim thus confers subject matter jurisdiction over her claims against the Port Authority arising from Pogacnik's exposure to asbestos while working at JFK Airport during approximately 1972-1973.

Plaintiff's notice of claim does not, however, encompass claims arising from Pogacnik's exposure to asbestos while working at JFK Airport during the late 1970s. Plaintiff insists that Pogacnik's testimony that he worked at JFK Airport during the late 1970s merely amplifies her notice of claim to cover any exposure extending through 1979, well beyond the notice of claim's specification of exposure to asbestos in "approximately 1972-73." Turner Aff. Ex. A, at 1. See DaSilva v. C & E Ventures, Inc., 83 A.D.3d 551, 551 (1st Dep't 2011). Yet Pogacnik testified that the two JFK Airport projects lasted, at most, a total of 16 months, so that Pogacnik could not possibly have been exposed to asbestos continuously from 1973 into 1975 or the "late '70s." Aff. of Jason P. Weinstein Ex. 1, at 236, 245. Even if 1972-73 is an approximation, and Pogacnik worked at JFK Airport beginning in 1974 rather than 1973, his exposure would have ended in 1975 at the latest. Plaintiff thus seeks to add an

additional exposure period during the late 1970s or change the exposure period altogether from 1972 through 1973 to the late 1970s in her notice of claim.

Plaintiff may not simply use "approximately" in the notice of claim to amplify the notice of claim to include the late 1970s and bring any exposure in the late 1970s under the ambit of the notice of claim. "Approximately" reasonably may be construed to include 1974 and 1975, but not to include the years of the late 1970s, 1976-1979. Allowing plaintiff to use "approximately" to add three to six years to the exposure originally claimed would defeat the notice of claim's purpose of enabling the Port Authority to ascertain the scope of the claim and investigate it. In re New York City Asbestos Litig., 24 N.Y.3d at 282. See Brown v. City of New York, 95 N.Y.2d at 392; Ayers v. Mohan, 145 A.D.3d at 555; Person v. New York City Hous. Auth., 129 A.D.3d 596. Even if the Port Authority suffered no prejudice from plaintiff's omission of Pogacnik's exposure in the late 1970s in the notice of claim, such a fact is immaterial. Lyons v. Port Auth. of N.Y. & N.J., 228 A.D.2d at 251; Luciano v. Fanberg Realty Co., 102 A.D.2d at 98.

III. CONCLUSION

Since plaintiff's notice of claim does not encompass Pogacnik's exposure from 1976 to 1979, the notice of claim does not confer subject matter jurisdiction over any claim arising from Pogacnik's exposure during those years. Insofar as plaintiff's claims arise from Pogacnik's exposure to asbestos at

JFK Airport during 1972 to 1975, however, the court denies defendant Port Authority of New York & New Jersey's motion to dismiss the claims against the Port Authority. C.P.L.R. § 3211(a)(2).

DATED: April 23, 2018

Lucy Billings

LUCY BILLINGS, J.S.C.

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